



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO OF 16 OF 2013

Appeal for original conviction and sentence of the Principal Resident Magistrate (H.M NYABERI, SPM) at Mwingi in Criminal Case No 557 of 2011

PHILIP KYALO MUSILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Philip Kyalo Musili, hereinafter the appellant, was tried for the offence of robbery with violence, convicted and sentenced to death. It is alleged that on 17th day of June 2011 at Mwingi Town in Mwingi District within Kitui County, jointly with another not before the court robbed Faith Ngugi Magiri of laptop model No. HPG 62, S/No 3CFO 21577J valued at Kshs 44,000, mobile phone make ELGTEL valued at Kshs 2,000, mobile phone make Nokia model No. C3 IMEI No. 351984044056075 valued at Kshs 9,999, Safaricom Modem S/No 351910040600582 valued at Kshs 2,000, a bag valued at Kshs 1,000, skirt suit valued at Kshs 2,500 and cash Kshs 6,500 all valued at Kshs 67,999 the property of the said Faith Ngugi Magiri.

The appellant is contesting the conviction and the sentence. He has, through his advocate Mr. Nyamu, advanced nine grounds of appeal in the petition of appeal dated 14th February 2013 and filed on the same date. Some of the grounds of appeal especially those challenging the evidence are duplicated. Simply put the appellant is stating the following:

- a. The case was not proved beyond reasonable doubt.
- b. The trial magistrate failed to critically analyze the evidence.
- c. The appellant was not identified as the person who robbed the complainant.
- d. The trial magistrates erred in finding that the complainant was violently robbed when there was no evidence.
- e. The trial magistrate failed to appreciate the appellant's defence.
- f. The sentence is harsh and excessive.

Mr. Nyamu submitted the evidence of Joseph Ngei Mwaniki, PW2, that the appellant pledged the stolen phone in exchange for Kshs 35 worth of a meal he had taken in his (PW2's) hotel was contradicted by that of Police Constable Leonard Odinga, PW5, who stated that the meal was worth Kshs 120 according to the information from PW2. Counsel further submitted that while PW2 testified that the appellant gave him the phone on 29th June 2011 he had used the phone on 22nd June 2011 according to the printout from Safaricom; that on cross examination PW2 contradicted himself by stating that the appellant gave him the phone on 17th June 2011; that the appellant was arrested and charged on the strength of the evidence of

PW2 yet it is PW2 who had the phone and that there is no other witness who pointed out to the appellant as the person who robbed PW1 and given the contradictions in the evidence counsel urged the court to find that the trial magistrate erred in finding the appellant guilty.

Mr. Nyamu further submitted that PW1 did not testify to having met the appellant; that she stated that she was shown to him as the person who had robbed her at the Police Station; that the appellant was arrested by PW5 who did not state who had identified the appellant to him at the time of arrest; that nothing was recovered from the appellants house; that it would be against the principles of criminal procedure to convict the appellant based on such evidence and that it is only fair to dismiss the appeal for lack of proof beyond reasonable doubt that the appellant is the robber.

It was further submitted that there was no force used because PW1 testified that whoever attacked her was not armed; that there was no other person arrested and in the absence of another person and a weapon the charge cannot be robbery with violence but a robbery under section 296 (1) Penal Code. Counsel for the appellant asked this court to acquit the appellant.

In reply learned state counsel Mr, Mailanyi opposed the appeal. He supported the conviction and sentence of the lower court. He submitted that the evidence of PW1 clearly showed that she was attacked by two men, one of them snatched her bag and ran off; that the act of snatching the bag is an act of violence; that PW2 was the key prosecution witness and his evidence is that the appellant deposited the phone with him for taking tea at PW2's hotel; that PW2 testified that the appellant told him he had received a call from mama Mugambi who told him that the phone had been stolen and he should return it to the DC's office Mwingi; that the appellant denied ever coming into contact with the phone but does not deny meeting PW2.

Mr. Mailanyi further submitted that the phone was traced by Safaricom to PW2 who led police to the appellant and that the appellant's defence did not shake prosecution case; that the fact that the appellant was found in possession of the phone he gave to PW2 places the appellant at the scene of the crime; that the evidence of being in possession is enough to convict one on robbery with violence. Learned state counsel cited the case of **Njenga Mukiria & another v Republic, Criminal Appeal No 175 of 2003** in support and submitted that the doctrine of recent possession shifts the burden of proof to the appellant to rebut that he was not the robber but he did not rebut (see **Vincent Omondi Ombeto & another v Republic, Criminal Appeal No 171 of 2002**).

Counsel submitted that the evidence is clear that as of 29th June 2011 the complainant was not in possession of the phone and that it was traced to PW2 who gave the name of the appellant as the person who had given him the phone. On the ingredients of robbery with violence, counsel submitted that the prosecution has proved there was more than one person who robbed the complainant but in the event that this court were to find that robbery with violence has not been proved, counsel urged the court to find robbery under section 296 (1) Penal Code was committed.

In response to the submissions by state counsel, counsel for the appellant submitted that PW1 did not state that she was accosted by two people but that she saw two men; that it cannot be assumed that both attacked her; that the phone was traced to PW2 and at no time was it shown that the appellant had the phone; that PW2's evidence was uncorroborated and the fact that the appellant went to PW2's hotel does not prove that he gave PW2 the phone.

The facts of this case are straight forward. Faith Ngugi Magiri, PW1, left her house at 6.00am on 17th June 2011. She was walking to the bus station to catch a bus to Nairobi. On a footpath between Mwingi Police Station and Ministry of Housing in Mwingi Town she saw two men walking downwards. On passing them, one of the men grabbed her bag which was hanging on her shoulder and ran away with it. Inside the bag was a laptop, two mobile phones, safaricom modem all whose particulars are given in the charge sheet, cash Kshs 6,500 and skirt suit. PW1 immediately reported the matter at Mwingi Police Station. She was called by the police on 27th August 2011 and informed that one the mobile phones had been recovered. She visited the Police Station and was shown a Nokia C3 phone (Ex. 1) one of those stolen from her. She activated it and the Serial No. 35198404405675 tallied with one in the receipt No.

004861 (Ex. 2).

The phone had been recovered from PW2 who informed police that it had been given to him by the appellant in exchange for debt of a meal worth Kshs 35. The appellant was to pick the phone upon settlement of the debt. The phone was traced to PW2 by PW5 through Safaricom mobile provider. This information led to the arrest of the appellant who was subsequently charged.

As the first appellate court we have a duty to examine and evaluate afresh all the evidence adduced in the lower court with a view to arriving at our own independent findings. While doing this we are alert to the fact that we did not observe the witnesses testify and give allowance for that.

We understand the issues raised here to be the following:

- i. Whether the appellant was identified as the person who snatched PW1's bag.
- ii. Whether the ingredients of robbery with violence are disclosed in this case.
- iii. Whether there are contradictions in the evidence.
- iv. Whether the doctrine of recent possession applies.
- v. Whether the trial magistrate critically analyzed the evidence to find that the case was proved beyond reasonable doubt.
- vi. Whether the trial magistrate failed to appreciate the appellant's defence.
- vii. Whether the sentence is harsh and excessive.

Starting with the ingredients of section 296 (2) Penal Code, we are guided by **Johana Ndungu v Republic, Criminal Appeal No 116 of 1995** where the court described the ingredients of robbery with violence as follows:

- i. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
- ii. **If he is in company with one or more other person or persons, or**
- iii. **If at, or immediately before, or immediately after the time of the robbery, he wounds beats, strikes or uses any other violence to any person**

The court held that proof of any one of these ingredients is enough to base a conviction on. See also **Dima Denge Dima & Others v Republic Criminal Appeal No 300 of 2007** where the court held that:

The elements of the offence under Section 296 (2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction.

In **Johana case above**, the court stated further that, **“In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.”**

We have evaluated the evidence of PW1. She stated that she saw two men walking downwards and on passing them one man grabbed her bag and ran off. She told the court that **“They ran downwards”**. We have no reason to doubt this evidence. The men were two and this proves one element of robbery with violence. We take into account that this is evidence of a single witness and we caution ourselves on the danger of relying on such evidence. The offence that was committed is robbery with violence.

On the issue of identity of the attackers, PW1 was categorical that she did not know them. She told the court that the appellant who was arrested in connection with the recovered mobile phone was shown to her at the Police Station. It is therefore correct for us to hold the view that the appellant was not one of the two men who attacked PW1. The trial magistrate was correct in finding that the complainant was attacked by unknown people.

We agree with counsel for the appellant that the trial magistrate failed to consider the appellant's defence.

We note that the trial magistrate summarized the defence but he failed to evaluate the same. He dwelt at length on the appellant's failure to cross examine PW2 on how the phone was given to him. It is trite law that an accused person does not have a duty to prove a case or to disprove the same. He has a right to remain silent during his trial and this would not be taken against him because the onus is always on the prosecution to prove a case beyond reasonable doubt.

With no evidence directly linking the appellant with the commission of this offence, the only evidence available for the prosecution is that of recovered phone. The evidence of PW2 therefore becomes crucial. Counsel for the appellant was alive to this fact hence his dwelling at length on this issue.

The evidence of PW2 is contradictory. He said he met the appellant on 29th June 2011 when the appellant went to his hotel; that appellant ordered tea on credit and deposited the phone in issue with him promising to pick it upon payment. He maintained that story on cross examination but on re-examination he said he could not remember whether he used the phone on 22nd June 2011 or 29th June 2011. The print-out from Safaricom (Ex. 5) shows that PW2 used that phone on 22nd June 2011. The number the lower court was told was registered in PW2's name, 0724306007, is shown in Ex. 5 as having been used from 22nd June 2011 all the way up to late July 2011. It is therefore not true that PW2 was given that phone on 29th June 2011. We also find contradiction in the value of the tea the appellant is said to have taken at PW2's hotel. Was it worth Kshs 35 as PW2 said or Kshs 120 as stated by PW5? PW5 said the figure was given to him by PW2.

We have no doubt that the appellant and PW2 knew each other and met. Evidence shows that the appellant used to vend water and that PW2 was his customer. PW2 told the lower court that the appellant told him mama Mukami called on the stolen phone and that she told him that the phone was stolen and should be returned to the DC's office. That call from Alice Mukami Magiri, PW3, telephone number 0723369189, was received on the stolen set on 17th June 2011. It is the word of PW2 against that of the appellant on this issue. The appellant testified to meeting PW2 on 24th August 2011 when PW2 complained of the delay in supplying him with water.

It is clear to us that the appellant was charged because PW2 mentioned him as the person who had given him the stolen phone. The trial magistrate did not apply the doctrine of recent possession which is the right principal to apply here. Had he done so and applied his legal mind correctly he would have evaluated that doctrine and arrived at the correct finding (see Vincent Omondi Ombeto case above which cites with approval Malingi v Republic [1989] KLR). This doctrine applies in instances where:

- i. The stolen item is found in possession of an accused person.
- ii. The item belongs to the complainant.
- iii. The stealing happened a short period prior to its being found with him.
- iv. The lapse of time from the stealing to the finding of the item with the accused was recent taking into account the nature of the item and the circumstances existing.

The doctrine raises a rebuttable presumption and therefore the person found in possession of the stolen item bears the burden of proving how he came to possess the item. The standard of proof is on the balance of probabilities. If there is evidence to show that the appellant was found in possession of the phone, then he has to rebut the presumption that because he had the phone in his possession a week or so after it was stolen he must be the robber. The problem we have is that the evidence on record does not prove beyond reasonable doubt that the appellant had the phone in his possession or that he is the one who gave it to PW2.

Even if we were to believe the evidence of PW2 and assume that the appellant had the phone in his possession, it is our view that the appellant's behaviour is not that of a suspected robber. If it is true he told PW2 that mama Mukami had called him about the stolen phone we take the view that it is unusual for a thief to accept a call from the phone he has stolen. Again PW2 said the appellant promised to come back to pay the debt and pick the phone so that he could return it to the DC's place in order to get the prize. PW2 said the appellant went back to PW2's hotel but found PW2 absent. If this evidence is true it

is our view that this is not usual for a robber. Our considered view is that the trial magistrate did not evaluate the evidence critically. Had he done this he would have found doubts in the evidence of PW2 whose evidence the prosecution relied in support of its case.

It is true that death sentence is excessive and harsh. Unfortunately it is the only sentence provided for under section 296 (2) Penal Code. This sentence will remain in our statutes until Parliament amends to law. Courts are not allowed any discretion in the matter. This is what a bench of five judges affirmed in **Criminal Appeal No 5 of 2008, Joseph Njuguna Mwaura & two others v Republic.**

We think we have said enough to demonstrate that this appeal has merit. Although we did not agree with the counsel for the appellant on the issues he raised that this was not robbery with violence, we agree with him on the other grounds. We find that the appellant was not identified as the robber or one of the robbers; the evidence of PW2 is contradictory; the trial magistrate failed to evaluate the evidence properly or at all and failed to consider the appellant's defence.

We proceed to allow this appeal. We hereby quash the conviction, set aside the sentence and order immediate release from custody of the appellant unless for any other reason he is lawfully held.

We make orders accordingly.

Dated and signed this 22nd November day of 2013.

S.N.MUTUKU

W. KORIR

JUDGE

JUDGE

Dated and delivered this 9th day of December 2013.

S. N. MUTUKU

JUDGE